STATE OF MICHIGAN

COURT OF APPEALS

CHERYL ANN HUGHES,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

UNPUBLISHED
March 7, 2006

No. 263688
Oakland Circuit Court
LC No. 2002-046154-CL

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

In this action alleging race, age, and sex discrimination, and unlawful retaliation under the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.*, plaintiff appeals as of right from the trial court's opinion and order granting defendant's motion for summary disposition under MCR 2.116(C)(7) and (10). We affirm.

Because plaintiff does not challenge the trial court's determination that claims arising before September 24, 1999, are barred by the statute of limitations, we deem this issue abandoned. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). With respect to plaintiff's claims arising after September 24, 1999, we review de novo the trial court's grant of summary disposition under MCR 2.116(C)(10). *Aho v Dep't of Corrections*, 263 Mich App 281, 287; 688 NW2d 104 (2004). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint. *Id.* at 287. Evidence offered in support of or in opposition to the motion is only considered to the extent it is substantively admissible. MCR 2.116(G)(6); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163-164; 645 NW2d 643 (2000). The motion should be granted if the affidavits, depositions, or other evidence show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Aho, supra* at 288.

We agree, on review de novo, that the trial court applied an incorrect legal analysis when addressing plaintiff's claim that she did not receive any of the eleven positions that she applied for with defendant's Opportunity Awareness Line (OAP) program because of her race. However, despite the incorrect legal analysis, we find that summary disposition was properly granted in favor of defendant because plaintiff failed to establish the requisite prima facia case of race discrimination.

MCL 37.2202(1)(a) provides that an employer shall not

> [f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

Under the indirect or circumstantial evidence approach underlying plaintiff's theory of discrimination, proof of defendant's discriminatory treatment may be established under the burden-shifting approaching in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). See *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 134; 666 NW2d 186 (2003). Tailoring this burden-shifting approach to plaintiff's particular theory of discrimination, it was necessary that plaintiff present, with respect to each of the eleven OAP positions, evidence that (1) she belonged to a protected class, (2) she suffered an adverse employment action, (3) was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination. *Hazle v Ford Motor Co*, 464 Mich 456, 463, 467; 628 NW2d 515 (2001). If a plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment decision. *Id.* at 464. If the defendant does so, "in order to survive summary disposition, the plaintiff must demonstrate that the evidence in this case, when construed in the plaintiff's favor, is 'sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff.'" *Id.* at 465 (citation omitted).

Here, the trial court failed to address each of the eleven OAP positions separately, and also erred by combining plaintiff's distinct claims based on her pay rate and the termination of her employment when finding that she established a prima facie case for defendant to rebut. Each alleged CRA violation merited separate consideration to determine whether the necessary causal nexus between discriminatory animus and the alleged adverse employment decision was established. *Sniecinski, supra* at 134-135; see also *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 285; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005) (overruling the continuing violation doctrine for purposes of the statute of limitations applicable to a CRA claim). Also, the trial court erred to the extent that it indicated that it was finding a prima facie case based only on the facts as alleged by plaintiff, because only substantively admissible evidence may be considered when deciding a motion under MCR 2.116(C)(10). *Veenstra, supra* at 163-164.

Hence, while we agree with plaintiff that the trial court incorrectly analyzed her failure-to-promote theory of race discrimination, this error permeates its entire analysis, not just its analysis of whether defendant offered substantively admissible evidence to rebut a prima facie case. Nonetheless, this Court will not reverse if the trial court reached the right result, albeit for the wrong reason. *Glazer v Lamkin*, 201 Mich App 432, 437; 506 NW2d 570 (1993); *Ford Motor Credit Co v Detroit*, 254 Mich App 626, 633-634; 658 NW2d 180 (2003).

Here, based on our de novo review of the record, we are not persuaded that plaintiff established the requisite prima facie case of race discrimination in the first instance with respect to any of the 11 OAP positions. Plaintiff clearly did not produce substantively admissible evidence to establish a prima facie case with respect to the ten OAP positions for which no successful candidate was identified. Insofar that plaintiff suggests that she should receive the

benefit of an adverse evidentiary inference with respect to these ten OAP positions, we deem this claim abandoned because plaintiff has not briefed the issue. *Prince, supra* at 197.

With regard to plaintiff's claim that she established a prima facie case of race discrimination with respect to defendant's decision to hire a Caucasian male for OAP No. 3894, we note that plaintiff's deposition testimony offered in opposition to defendant's motion indicates that George Seymour was involved in the hiring decision, and that he interviewed plaintiff for this position. The material question is whether the decisionmaker for OAP No. 3894 selected the successful candidate over plaintiff under circumstances giving rise to an inference of race discrimination. Because plaintiff failed to set forth specific facts giving rise to such an inference, the trial court reached the correct result in granting summary disposition in favor of defendant with respect to this adverse employment action. *Hazle, supra* at 463, 470-471; MCR 2.116(G)(4). Further, because plaintiff failed to establish a prima facie case of race discrimination with respect to her failure to receive an offer for OAP No. 3894, it is unnecessary to address plaintiff's claim that answers to interrogatories submitted by defendant to establish a nondiscriminatory reason for this employment action did not constitute substantively admissible evidence and, therefore, could not be considered.

Next, we conclude that the trial court also incorrectly analyzed plaintiff's claim of disparate pay based on her race, sex, or age, by subjecting it to the same analysis that it applied in considering plaintiff's failure-to-promote theory of race discrimination. We hold, however, that the trial court reached the correct result in granting summary disposition to defendant because plaintiff did not establish a prima facie case of discrimination based on disparate pay during the relevant time period after September 24, 1999.

To make out a prima facie case of disparate treatment, a plaintiff must show that he or she was a member of a protected class and was treated differently than persons of a different class for the same or similar conduct. *Meagher v Wayne State Univ*, 222 Mich App 700, 716; 565 NW2d 401 (1997). All relevant aspects of the person's employment situation must be nearly identical to the plaintiff's situation. *Smith v Goodwill Industries of W Michigan, Inc*, 243 Mich App 438, 449; 622 NW2d 337 (2000). Under *Hazel, supra* at 463, the plaintiff's prima facie case must be such as to give rise to an inference of discrimination.

For an employment decision to be actionable in a discrimination case, there must generally be some objective evidence demonstrating that it was a materially adverse action. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 364; 597 NW2d 250 (1999). Here, the evidence showed that plaintiff was in the Vehicle Synthesis Analysis Simulation group on September 24, 1999, having transferred to that group in July 1999. Although plaintiff asserted that she was systematically paid less than comparable Caucasian employees at every step of her employment, it was incumbent upon plaintiff to establish an actionable pay decision within the limitations period and to identify a similarly situated employee outside of her protected class, who was treated differently from her, to establish a prima facie case of disparate

pay treatment. Because plaintiff failed to do so, the trial court reached the correct result in finding no genuine issue of material fact for trial.[1]

Finally, with regard to plaintiff's termination, plaintiff has abandoned any challenge to the trial court's grant of summary disposition with respect to plaintiff's claim that her employment was terminated because of her age, race, or sex, inasmuch as plaintiff does not address these claims. *Prince, supra* at 197. We therefore limit our review of the termination decision to plaintiff's claim that she was terminated in retaliation for complaining about discrimination to defendant's chief executive officer in February 2001.

Initially, plaintiff has not substantiated her contention that the trial court essentially determined that she quit her job as a basis for granting summary disposition in favor of defendant on this issue. This Court will not search the record for factual support for a plaintiff's claim. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004). Further, the record indicates that plaintiff did not argue a theory of constructive discharge until moving for reconsideration of the trial court's summary disposition decision. Because plaintiff does not address the trial court's decision denying rehearing, we decline to address it. *Prince, supra* at 197; see also *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

In any event, plaintiff's theory of constructive discharge lacks merit because defendant did not argue in its motion for summary disposition that plaintiff left her job voluntarily. *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487; 516 NW2d 102 (1994). Moreover, the evidence indicated that a voluntary termination would only have occurred if plaintiff accepted the career transition program, with the ten-month severance program, that was offered to her. The evidence established that plaintiff did not accept the career transition program, although she was given a separation package in connection with her involuntary termination. The dispositive question, therefore, is whether plaintiff established a genuine issue of material fact with respect to whether her employment was involuntarily terminated based on retaliatory animus.

MCL 37.210(a) prohibits retaliation or discrimination against a person who opposes a violation of the CRA. Viewing the evidence in a light most favorable to plaintiff, we agree with the trial court that plaintiff did not present direct evidence that the decisionmakers in defendant's human resources unit and, in particular, Gail Hopkins, were motivated by retaliatory animus to terminate plaintiff's employment. *Sniecinski, supra*, at 132-133; *Aho, supra* at 288.

Plaintiff also failed to establish a prima facie case of retaliatory discharge. The requisite causation must be something more than a mere coincidence in time between the protected activity and the adverse employment action. *Garg, supra* at 286. The plaintiff must show that

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[1] We note that the dissent finds support for the disparate pay claim in a May 17, 2000, document produced within GM's Human Resources Department. The document provides that a 25% compensation increase would bring plaintiff "to 86% to market for 7E10." Plaintiff only received a 9.8% increase. Although the document may support plaintiff received below market compensation, the document does not support that she was treated differently than similarly situated employees outside of her protected class.

his or her participation in the protected activity was a significant factor in the termination decision, not merely a causal link between the two events. *Aho, supra* at 289. Here, even if the evidence that plaintiff's termination, which occurred during the course of her contact with Hopkins about the legal department's failure to substantiate her discrimination complaint, could be considered sufficient to establish a prima facie case of retaliation, defendant's proffered reason for plaintiff's termination was sufficient to rebut an inference of retaliation and shift the burden back to plaintiff to show that the reason was not the true reason, but only a pretext for a retaliatory discharge. *Aho, supra* at 289.

Plaintiff's disinterest in an engineering position was not the equivalent of a voluntary termination, but was the reason Hopkins gave for deciding that plaintiff's employment should be terminated. Viewed in a light most favorable to plaintiff, the evidence did not show that plaintiff never expressed a disinterest in an engineering position, that her stated disinterest was not the actual motivation for her termination, or that her expressed disinterest was not a reason to warrant termination. The soundness of defendant's business judgment may not be questioned as a means of showing pretext. *Meagher, supra* at 712. Hence, summary disposition of plaintiff's retaliatory discharge claim was proper under MCR 2.116(C)(10).

Affirmed.

/s/ Kathleen Jansen
/s/ Kurtis T. Wilder